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NOTE VERBALE DATED 30 APRIL 1993 FROM THE PERMANENT REPRESENTATIVE OF THE NETHERLANDS TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

The Permanent Representative of the Kingdom of the Netherlands to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to submit herewith the observations of the Government of the Kingdom of the Netherlands on the establishment of an international ad hoc tribunal for the prosecution and punishment of war crimes in the former Yugoslavia.

The Permanent Representative would appreciate it if the Secretary-General could have this letter and its annex circulated as a document of the Security Council.

Annex

Observations of the Government of the Kingdom of the Netherlands on the establishment of an international ad hoc tribunal for the prosecution and punishment of war crimes in the former Yugoslavia

1. Introduction

Security Council resolution 808 (1993) states "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".

In order to contribute to the preparation of a report on the establishment of such a tribunal, as requested in paragraph 2 of the resolution, the Netherlands would put forward the following observations. Given the fact that the Secretary-General has already received several proposals containing draft charters for such a tribunal, the Netherlands will limit its observations to those issues which, in the opinion of the Netherlands, require further consideration. These observations relate to the following topics:

- The legal foundation for a charter;
- The law to be applied by and the competence of the ad hoc tribunal;
- The persons to be prosecuted;
- Trial in absentia;
- The sanctions to be applied;
- The investigation;
- The cooperation of States with the ad hoc tribunal;
- Institutional issues.

2. Legal basis for a charter

The Netherlands is of the opinion that in principle a treaty is the most solid legal basis for the establishment of a tribunal. This applies primarily to permanent tribunals, but would also be preferable in the case of an ad hoc tribunal. Since it is clear that the conclusion of a treaty would be complicated and time-consuming, and since the Security Council has already declared violations of international humanitarian law to be a threat to international peace and security, it seems appropriate under these circumstances for the Security Council to take the further necessary measures with regard to the establishment of an ad hoc tribunal for the former Yugoslavia. Establishment on this basis will also have clear consequences for the functioning and duration of the court.

3. Applicable law and competence of the ad hoc tribunal

As far as the law to be applied by the ad hoc tribunal is concerned, the following considerations should, in the opinion of the Netherlands Government, play an important role.

First, it must be observed that international law itself contains a series of substantive norms, that is to say: provisions explicitly prohibiting certain conduct and declaring this conduct a crime under international law. The application of these international norms by the ad hoc tribunal will not therefore constitute a violation of the principle of nullum crimen sine lege. However, these norms lack a specific sanction; they are not formulated in such a way as to allow for direct application by judicial bodies to specific situations and persons. Such specific sanction norms are normally contained in the national law of countries which are party to the relevant treaties. Such treaties limit themselves to imposing an obligation on the parties to "translate" the substantive norms of the treaty into sanction norms (criminal offences) under national law.

Second, it may be observed that the former Yugoslavia was party to a considerable number of universal conventions relating to human rights and humanitarian law. It was, for example, a party to the Convention on the Suppression and Punishment of the Crime of Genocide and to the four Geneva Conventions of 1949 and the 1977 Additional Protocols thereto. On the basis of the principles relating to the succession of States in respect of treaties, the republics which emerged from the former Yugoslavia may be considered to be equally bound by the above-mentioned conventions.

Third, it may be observed that the former Yugoslavia has given effect to the above-mentioned conventions by providing in its national criminal law for sanction norms relating, inter alia, to genocide and war crimes. However, it is at the moment unclear to what extent the criminal law which was applicable in the former Yugoslavia is still in force in the new republics.

On the basis of these considerations, the Netherlands favours a system whereby the ad hoc tribunal would prosecute suspects on the basis of violations of substantive norms under international law but would as far as the available sanctions are concerned refer to the national law of the former Yugoslavia, it being understood that in principle the court would not be allowed to impose sanctions of greater severity than those provided for under national law for similar offences. Only if this system is adopted will optimal effect be given to the principle of nullum crimen, nulla poena sine lege.

On the basis of the preceding considerations, the competence ratione materiae of the ad hoc tribunal would extend to the following:

- War crimes;

- Crimes against humanity.

As far as the definition of war crimes is concerned, reference may be made to the grave breaches enumerated in the Geneva Conventions of 1949 and the First Protocol of 1977. Crimes against humanity, on the other hand, are not

explicitly elaborated in international law in substantive norms, with the exception of the crime of genocide. However, it is clear that the crimes which are considered to be crimes against humanity (such as murder, manslaughter, deprivation of liberty, rape and deportation) are prohibited and punishable under the national law of any self-respecting State. In the former Yugoslavia too, these crimes were offences under the criminal code. Although violations of national norms of criminal law will not in general amount to crimes against humanity, under exceptional circumstances they will. Such circumstances are present if the offences are committed as part of the deliberate, systematic persecution of a particular group of people and/or are designed systematically to deprive that group of people of their rights, and if the government, which under national law is bound to prevent and suppress such crimes, tolerates or even assists the commission of such crimes against that group of people. Acts of this kind undermine the norms and principles of the international community. In such cases, therefore, the international community has the right to deal with these offences and to undertake to prosecute and try those who commit them.

4. Persons to be prosecuted

In the French proposal for an ad hoc tribunal (report of the Committee of French Jurists set up to study the establishment of an international criminal tribunal to judge the crimes committed in the former Yugoslavia (see S/25266)) a distinction is made between three categories of perpetrators of the crimes to be prosecuted. The report observes that at both the Nuremberg and the Tokyo trials, the prosecution was limited to the "major war criminals", that is to say to the first of the three categories mentioned in section H of the report.

In the opinion of the Netherlands, a comparable approach might be taken by the ad hoc tribunal in the prosecution of war crimes committed in the former Yugoslavia. This would imply that the following offences in particular should be within the competence of the ad hoc tribunal:

- The fact of having ordered, authorized or permitted the commission of war crimes and/or crimes against humanity, and

- The fact of being in a position "to influence the general standard of behaviour" and having culpably neglected to take action against crimes of that kind. This is the case if the persons concerned should have known of the relevant acts, and could have prevented, terminated, or repressed the commission of those acts, and were duty-bound thereto, but failed to do so.

The fact that prosecution should, in the opinion of the Netherlands, focus on major war criminals does not mean that no action should be taken to investigate offences committed by subordinate personnel. On the contrary, such offences have to have been established, after all, before efforts can be made to determine where the responsibility for these crimes lay. It is advisable, however, to consider from the outset, while investigating individual crimes, whether and to what extent such crimes were committed within a systematic pattern of action or other context which could indicate that responsibility was shared by persons in senior positions. In short, it would be advisable to try to establish from the outset whether the offence was an initiative of the

offender (and possibly a number of co-perpetrators) or whether his superiors (leaders) may be considered to have been guilty of complicity in or procuring the commission of the crime.

In the opinion of the Netherlands, such "minor" offenders should not of course remain unpunished. Their prosecution and punishment might, however, be left in principle to national judicial bodies, as soon as the circumstances allow for an impartial and fair trial.

As far as the jurisdiction of the tribunal in relation to the jurisdiction of national courts is concerned, the Netherlands therefore proposes that there should be concurrent jurisdiction, with a primary role for the international tribunal with respect to major war criminals.

5. Trial in absentia

A special problem relates to the question of whether the tribunal should also try suspects in absentia. On the one hand such a procedure may create a situation in which a person, convicted in absentia although not punished, will at least feel unsafe. On the other hand, it is to be expected that such a procedure will be perceived by the public as a sign of the tribunal's weakness. Furthermore, because during the trial in absentia the accused cannot defend himself and cannot contest the evidence, any conviction resulting from such a trial will also be questionable from a legal point of view. It also seems that the verdict will have to be served on the convicted person, in order for the period within which an appeal can be lodged to commence. This will lead to difficulties if that person cannot be found in good time, given that the ad hoc tribunal will only be in existence for a certain period. Given these considerations, the Netherlands prefers not to provide for trial in absentia. After all, the effects of a conviction in absentia on the person concerned can also be achieved in a less time-consuming way. In other words, it would suffice for the prosecuting office to prepare a file on the suspect and to conclude that on the basis of that file serious suspicions exist that the person concerned has committed war crimes or crimes against humanity. As a result of such suspicions, the tracing and prosecution of the suspect may be organized. If the suspect is subsequently arrested, trial can follow.

6. Sanctions to be applied

An appropriate sanction norm has to be created both for war crimes and for crimes against humanity to be applied by the ad hoc tribunal. In the opinion of the Netherlands this sanction norm should be derived from the norms which were applicable under former Yugoslav national law: the sanctions should not be more severe in principle than those imposed under national norms, in order to safeguard the nulla poena sine lege principle. As far as the death penalty is concerned, which was applicable in former Yugoslavia, the Netherlands agrees with the other proposals already submitted to the Secretary-General that this sanction should be ruled out.

A particular problem arises with respect to the prosecution of persons who have already been tried and sentenced by a national judicial body. Although the

principle of non bis in idem is not applicable at international level, it would in the opinion of the Netherlands be highly unfair if these national sanctions were not taken into account. Given the primary responsibility of the ad hoc tribunal for the trial of major war criminals in particular, the Netherlands favours the proposals on this issue contained in the report of France (see S/25266) and the United States of America (see S/25575).

7. Investigation and prosecution

The success of the tribunal will largely depend on the question of whether investigation of the atrocities committed in the former Yugoslavia will provide sufficient evidence for the prosecution of the individuals considered responsible for those offences. In the opinion of the Netherlands, after the adoption by the Security Council of a charter for an ad hoc tribunal, priority should be given to the creation of an effective investigation and prosecution apparatus. The later investigations begin, the more difficult it will be to find the necessary evidence for the prosecution of suspects. It is therefore proposed that the investigation and prosecution of crimes committed in the former Yugoslavia should start immediately after the adoption of the charter. At the same time, however, the Netherlands observes that it will be impossible to start trials of suspects before the hostilities in former Yugoslavia have ended.

The investigation and prosecution apparatus should consist of at least several hundred investigators, comprising inter alia public prosecutors, policemen and medical specialists, all with considerable experience in the investigation of serious crimes. At least some of these investigators should have an active knowledge of the languages spoken in the former Yugoslavia in order to avoid problems relating to the translation of statements by witnesses and suspects.

In order to function effectively, the investigators should be invested with the powers of house-search, pre-trial detention, etc., laid down in the code of criminal procedure of the former Yugoslavia. The right to exercise these powers should be conferred by the Security Council resolution adopting the charter of the ad hoc tribunal. This resolution should furthermore provide for an obligation on local authorities to provide all assistance possible to the international investigators.

8. Cooperation of States with the ad hoc tribunal

Chapter VII of the Charter is needed as a legal basis to ensure that all States will cooperate in every possible way with the investigation and prosecution of war crimes in the former Yugoslavia. It is emphasized here that this obligation does not apply only to the former Yugoslav republics but to all United Nations Members. Although most of the evidence must be found in the former Yugoslavia, thousands of former Yugoslav nationals who have witnessed the commission of war crimes and crimes against humanity have fled the country. Furthermore, people suspected of offences may have fled or will flee or attempt to flee to other countries. It is of major importance that these witnesses too may be involved in the investigation and prosecution of the offences and it is

of course also very important that persons against whom prima facie evidence is collected relating to the commission of serious offences will be brought before the tribunal either as witnesses or as suspects and will not escape simply by fleeing from former Yugoslav territory.

9. Institutional issues

Composition of the tribunal

The tribunal should be composed in such a way that it will fulfil the requirements which are laid down in several universal and regional human rights instruments. This means inter alia that at least three chambers must be established, dealing with several stages of the criminal proceedings. One chamber should deal with questions relating to pre-trial procedure, such as the need for pre-trial detention of suspects, etc. Another chamber should try the cases at first instance. This investigation must relate to both questions of fact and questions of law. The third chamber should act as a chamber of cassation and appeal. The Netherlands would prefer a procedure which would in principle be linked to questions of law. Only if the judgement of the "second" chamber were to be annulled on this basis, would the "third" chamber be required to issue a final decision on both questions of fact and questions of law.

Whatever system of appeal is chosen, it follows from the "equality of arms" principle that appeal must be equally accessible to the defendant and to the prosecuting office.

The first chamber may be composed of three to five judges, the other two chambers preferably of five judges. When composing these chambers it should be kept in mind that the major legal systems should be represented. Furthermore, it would be advisable to include judges from the former Yugoslavia in these chambers.

In addition, a review and/or a pardon procedure should be available at the request of the convicted person on the basis of new facts or circumstances.

Seat

In the opinion of the Netherlands it is important that the tribunal be a suborgan of the United Nations, entrusted with duties which have to be fulfilled independently. Furthermore, the composition of the tribunal should reflect its universal character. This character derives in the first place from the fact that the tribunal will be established on the basis of a Security Council resolution. Whatever location is chosen as the seat of the tribunal, the possibility should be left open of holding preliminary investigations and trials either in the former Yugoslavia or elsewhere, wherever it is most convenient and efficient.